

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DEBRA A. SPAH,

Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner of
Social Security Administration,

Defendant.

CASE NO. C09-5659RJB

REPORT AND RECOMMENDATION

Noted for September 10, 2010

This matter has been referred to Magistrate Judge J. Richard Creatura pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Magistrates Rule MJR 4(a)(4) and as authorized by Mathews, Secretary of H.E.W. v. Weber, 423 U.S. 261 (1976). This matter has been fully briefed. After reviewing the record, the undersigned finds the ALJ improperly considered a DSHS evaluation as an “accommodation opinion”, adversely affecting the review of plaintiff’s application for social security benefits. Accordingly, the undersigned recommends remand to the administration for further consideration.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff, Debra Spah, is currently 44 years old. Tr. 221. She graduated from high school. Tr. 321. She has work experience as a temporary employee, working various types of jobs. She has also owned and operated a house cleaning business for several years until 1997. Tr. 321, 955-59. In 1997, plaintiff was involved in a motor vehicle accident, resulting in neck and back pain. Tr. 320.

On June 19, 1998, plaintiff filed applications for social security benefits. Plaintiff initially alleged she became disabled on June 12, 1997. Tr. 24. Plaintiff's earlier applications were denied without being appealed.

On September 11, 2003, plaintiff filed a new application for supplemental income benefits (SSI). In a report filed September 11, 2003, plaintiff alleged that she became unable to work on May 10, 2001, due to liver toxemia, gallbladder disease, colon polyps, "EGD," abnormal small bowel, depression, anxiety and panic disorder. Tr. 506. At the hearing, plaintiff amended her alleged onset date to July 30, 2002, the day after a prior unfavorable ALJ decision. Tr. 24, 946. In a post-hearing decision dated June 29, 2007, the ALJ issued a written decision. Tr. 24-45. The ALJ found plaintiff not disabled between July 30, 2002 and May 1, 2004, but she also found plaintiff disabled for a closed period beginning on May 1, 2004, and ending on June 1, 2006. Tr. 42, 45.

Specifically, the ALJ found in relevant part as follows:

(1) At step-one of the sequential disability evaluation process, plaintiff had not engaged in substantial gainful activity since July 30, 2002;

(2) At step-two, plaintiff had "severe" impairments consisting of anxiety disorder, depressive disorder, and substance abuse in remission;

(3) At step-three, none of plaintiff's impairments met or medically equaled the criteria of any of those listed in 20 C.F.R. Part 404, Subpart P, Appendix 1;

1 (4) After step-three but before step-four, the ALJ found that, from July 30, 2002 to
2 May 1, 2004, plaintiff retained the capacity to occasionally lift and carry 20 pounds, frequently
3 lift and carry 10 pounds, stand about 6 hours in an 8-hour workday, walk about 6 hours in an 8-
4 hour workday, and sit about 6 hours in an 8-hour workday. She could perform work involving
5 simple repetitive tasks but not requiring constant attention to detail. She could handle occasional
6 contact with co-workers and the public in a stable work environment with not much adjustment
7 or change in work duties. From May 1, 2004 to June 2, 2006, the ALJ found plaintiff would
8 miss work two or more days per month due to her impairments;
9

10 (5) At step-four, plaintiff was unable to perform past relevant work since July 30,
11 2002;

12 (6) At step-five, from July 30, 2002 to May 1, 2004, plaintiff was capable of
13 performing other jobs existing in significant numbers in the national economy;
14

15 (7) According to the ALJ, medical improvement occurred as of June 2, 2006, the date
16 plaintiff's disability ended;

17 (8) Beginning June 2, 2006, plaintiff was found capable of making a successful
18 adjustment to work and the ability to perform other jobs existing in significant numbers in the
19 national economy.
20

21 Tr. 24-45.

22 Plaintiff appealed the ALJ's decision, but the Appeals Council denied plaintiff's request for
23 review. Tr. 1-5. As a result, the ALJ's decision is the Administration's final decision. 20 C.F.R. §
24 416.1481. Plaintiff subsequently filed the instant matter with the court seeking judicial review of
25 the administrative decision. Plaintiff argues the ALJ's decision should be reversed and
26 remanded to the Commissioner for an award of benefits or, in the alternative, for further

1 administrative proceedings. Specifically, plaintiff raises the following five issues in her Opening
2 Brief (Doc. 14):

3 (a) The ALJ failed to provide legitimate reasons for rejecting medical opinion
4 evidence.

5 (b) The ALJ failed to properly evaluate plaintiff's testimony regarding her symptoms
6 and limitations.

7 (c) Plaintiff's impairments have met or equaled Listing 12.04 of the Listings of
8 Impairments and the ALJ erred in not making this conclusion.

9 (d) The ALJ improperly determined plaintiff's residual functional capacity (RFC).

10 (e) The ALJ erroneously found that plaintiff experienced medical improvement.

11 (f) The ALJ failed to properly show that plaintiff is able to perform other work within
12 the national economy.

13 (g) The Administration's Appeals Council failed to remand the matter for a new
14 hearing based upon new evidence.

15 **DISCUSSION**

16 This Court must uphold the Commissioner's determination that plaintiff is not disabled if
17 the Commissioner applied the proper legal standard and there is substantial evidence in the
18 record as a whole to support the decision. Hoffman v. Heckler, 785 F.2d 1423, 1425 (9th Cir.
19 1986). Substantial evidence is such relevant evidence as a reasonable mind might accept as
20 adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Fife v.
21 Heckler, 767 F.2d 1427, 1429 (9th Cir. 1985). It is more than a scintilla but less than a
22 preponderance. Sorenson v. Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975); Carr v.
23 Sullivan, 772 F. Supp. 522, 524-25 (E.D. Wash. 1991). If the evidence suggests more than one
24
25
26

1 rational interpretation, the Court must uphold the Commissioner's decision. Allen v. Heckler,
2 749 F.2d 577, 579 (9th Cir. 1984).

3 The ALJ is responsible for determining credibility and resolving ambiguities and
4 conflicts in the medical evidence. Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998). Where
5 the medical evidence in the record is not conclusive, "questions of credibility and resolution of
6 conflicts" are solely the functions of the ALJ. Sample v. Schweiker, 694 F.2d 639, 642 (9th Cir.
7 1982). In such cases, "the ALJ's conclusion must be upheld." Morgan v. Commissioner of the
8 Social Security Administration, 169 F.3d 595, 601 (9th Cir. 1999). Determining whether
9 inconsistencies in the medical evidence "are material (or are in fact inconsistencies at all) and
10 whether certain factors are relevant to discount" the opinions of medical experts "falls within this
11 responsibility." Id. at 603.

12
13 In resolving questions of credibility and conflicts in the evidence, an ALJ's findings
14 "must be supported by specific, cogent reasons." Reddick, 157 F.3d at 725. The ALJ can do this
15 "by setting out a detailed and thorough summary of the facts and conflicting clinical evidence,
16 stating his interpretation thereof, and making findings." Id. The ALJ also may draw inferences
17 "logically flowing from the evidence." Sample, 694 F.2d at 642. Further, the Court itself may
18 draw "specific and legitimate inferences from the ALJ's opinion." Magallanes v. Bowen, 881
19 F.2d 747, 755, (9th Cir. 1989).

20
21 The ALJ must provide "clear and convincing" reasons for rejecting the uncontradicted
22 opinion of either a treating or examining physician. Lester v. Chater, 81 F.3d 821, 830 (9th Cir.
23 1996). Even when a treating or examining physician's opinion is contradicted, that opinion "can
24 only be rejected for specific and legitimate reasons that are supported by substantial evidence in
25 the record." Id. at 830-31. However, the ALJ "need not discuss all evidence presented" to him
26

1 or her. Vincent on Behalf of Vincent v. Heckler, 739 F.3d 1393, 1394-95 (9th Cir. 1984)
2 (*citation omitted*). The ALJ must only explain why “significant probative evidence has been
3 rejected.” Id.; *see also* Cotter v. Harris, 642 F.2d 700, 706-07 (3rd Cir. 1981); Garfield v.
4 Schweiker, 732 F.2d 605, 610 (7th Cir. 1984).

5 In general, more weight is given to a treating physician’s opinion than to the opinions of
6 those who do not treat the claimant. Lester, 81 F.3d at 830. On the other hand, an ALJ need not
7 accept the opinion of a treating physician, “if that opinion is brief, conclusory, and inadequately
8 supported by clinical findings” or “by the record as a whole.” Batson v. Commissioner of Social
9 Security Administration, 359 F.3d 1190, 1195 (9th Cir. 2004); Thomas v. Barnhart, 278 F.3d
10 947, 957 (9th Cir. 2002); Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir. 2001). An
11 examining physician’s opinion is “entitled to greater weight than the opinion of a nonexamining
12 physician.” Lester, 81 F.3d at 830-31. A non-examining physician’s opinion may constitute
13 substantial evidence if “it is consistent with other independent evidence in the record.” Id. at
14 830-31; Tonapetyan, 242 F.3d at 1149.

15 Here, as noted above the ALJ relied on the opinion of Dr. Sandvik and the state agency
16 consulting physician’s evaluation of the record to assess plaintiff’s mental impairments,
17 particularly during the relevant period from July 30, 2002 to May 1, 2004. At step-two, the ALJ
18 found plaintiff suffered from both an anxiety and a depressive disorder. Tr. 28. The ALJ
19 evaluated the limitations caused by these impairments, and in doing so, the ALJ either rejected or
20 discounted the opinions Dr. Reineman, Ms. Bradley, Dr. Moore, Dr. Porter, and Ms.
21 Wagonblast. Plaintiff argues the ALJ erred in rejecting these opinions, which consistently rated
22 plaintiff’s impairments as being more severe than Dr. Sandvik or the state agency evaluator.
23
24
25
26

1 After reviewing the record, the undersigned finds the ALJ improperly rejected the
2 evaluations completed by Dr Moore and Ms. Bradley. The ALJ wrote, in part, the following:

3 Overall, the limitations assessed in those forms are not supported by the objective
4 medical evidence. Such DSHS opinions are likely accommodation opinions
5 rather than opinions on residual functional capacity and the ability to work. The
6 forms were not completed in an attempt to seek treatment for symptoms, but
7 rather, in connection with an effort to generate evidence for the current appeal
8 with the intent to help the claimant continue to receive welfare benefits and secure
9 Social Security benefits. Although such evidence is certainly legitimate and
10 deserves due consideration, the context in which it was produced cannot be
11 entirely ignored.

12 Tr. 38.

13 It was improper for the ALJ to discount the opinions in this fashion. Medical evidence
14 cannot legitimately be discounted based on the context in which it was obtained. *See Reddick v.*
15 *Chater*, 157 F.3d 715, 726 (9th Cir. 1998)(In the absence of other evidence to undermine the
16 credibility of a medical report, the purpose for which the report was obtained does not provide a
17 legitimate basis for rejecting it.).

18 Here, the court cannot ignore the statement that the ALJ believes that DSHS evaluations
19 are prepared for the purpose of qualifying someone for welfare or disability benefits. Such a bias
20 makes any review of such opinions unfair to the social security claimant. Accordingly, the
21 matter must be remanded to the administration for further consideration. The administration
22 must determine whether or not the medical evidence supports a finding of disability and whether
23 or not plaintiff's condition improved as concluded by the ALJ.

24 As further argued by plaintiff, the ALJ's error in evaluating the medical opinion evidence
25 requires a complete re-evaluation of the medical record, plaintiff's residual functional capacity,
26 and plaintiff's testimony. On remand, the administration should review the application for
benefits and the evidence in their entirety and reconsider each of the five-steps in the

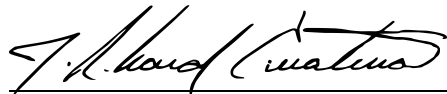
1 administrative process. In addition, on review the administration should review and include in
2 the record any further evidence relevant to plaintiff's claims of disability.

3 CONCLUSION

4 Based on the foregoing discussion, the Court should remand the matter to the
5 administration for further consideration. Remand for reconsideration of the ALJ's RFC finding,
6 particularly plaintiff's mental limitations, and step-five analysis will necessarily require the
7 administration to reconsider the medical evidence and plaintiff's testimony in their entirety.
8 Accordingly, the other issues presented by plaintiff are essentially moot and were therefore not
9 specifically addressed in this report.
10

11 Pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure ("Fed. R. Civ. P.")
12 72(b), the parties shall have fourteen (14) days from service of this Report and Recommendation
13 to file written objections thereto. See also Fed. R. Civ. P. 6. Failure to file objections will result
14 in a waiver of those objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985).
15 Accommodating the time limit imposed by Fed. R. Civ. P. 72(b), the clerk is directed set this
16 matter for consideration on September 10, 2010, as noted in the caption.
17

18 Dated this 13th day of August, 2010.

19
20 

21 J. Richard Creatura
22 United States Magistrate Judge
23
24
25
26